IN THE MATTER OF THE ARBITRATION BETWEEN	)	
	)	FMCS FILE No. 002-16468
Carl T. Hayden Veterans Administration Medical Center	)	
	)	GRIEVANCE: Inequitable Treatment in Promotion Process
and	)	
Local 2382 American Federation of Government Employees (AFGE)	)	GRIEVANT: David Merritt

OPINION AND AWARD

ARBITRATOR: DANIEL R. SALING, Esq.

AWARD DATE: APRIL 24, 2003

APPEARANCES FOR THE PARTIES

AGENCY: Martin H. Lieberman
VA Medical Center
650 East Indian School Road
Phoenix, Arizona, 85012

UNION: Randolph L. Brumm
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WITNESSES:

For the Union:

Leslie Cohn-Oswald
Pam Shalongo
Michael Darling
Aruvell Tippett
Joe Judge
Kathy Sherman
Howard Mitchell
Michael Kump
Sona Galfayan
David Merritt
Scott Timiney
Dragan Milanovich
Michael Gump
Melvin McGee
Currie Kump
Teresa Austin

For the Agency:

Michael Gump
Nancy Campbell
Amy Taylor
Max Avilez
Toni Thompson-Winningham
Donna Vollmer
Richard Pasquale

PROCEDURAL HISTORY

The Carl T. Hayden Veterans Administration Medical Center is hereinafter referred to as the "Agency". Local 2382 of the American Federation of Government Employees (AFGE) is hereinafter referred to as the "Union". Mr. David Merritt, is hereinafter refereed to as the "Grievant".

The Grievance in question, FMCS Number 002-16468 was submitted to the Agency in writing on or about May 28, 2002 and thereafter processed in accordance with Article 42 of the Master Agreement, between the Agency and Union first effective 1997, hereinafter referred to as the "Agreement". Following unsuccessful attempts at resolving the grievance it was referred to arbitration in accordance with Articles 40 and 42 of the Agreement. Using the services of the Federal Mediation and Conciliation Service (FMCS), Daniel R. Saling was appointed as Arbitrator.

An arbitration hearing was held at the Carl T. Hayden Veterans Administration Medical Center on November 14 and 15, 2002 and then on January 29, 2003. During the course of the hearing both parties were afforded full opportunity for the presentation of evidence, examination and cross-examination of witnesses, and oral argument. Witnesses were sequestered during the hearing and were duly sworn.

A stenographic record and transcript of the arbitration hearing was prepared by and under the direction of the parties. The Arbitrator received copies of the transcripts for the November hearing dates on December 15, 2002 and on February 19, 2003 for the January hearing date.

The parties elected to file post-hearing briefs. The Arbitrator received timely postmarked briefs from both parties. The Arbitrator received the last brief on March 28, 2003.

The parties were not able to stipulate that the grievance and arbitration were timely and properly before the Arbitrator. Further the parties were not able to stipulate that the Arbitrator had authority to render a final and binding decision in this matter.

The parties agreed hat the Arbitrator could determine the issues to be resolved in the instant arbitration after receiving evidence and hearing the arguments presented.

PERTINENT PROVISIONS OF THE AGREEMENT:

ARTICLE 2 – GOVERNING LAWS AND REGULATIONS

Section 1 – Relationship to Law and Regulations

In the administration of all matters covered by this Agreement, officials and employees shall be governed by applicable Federal statutes. They will also be governed by Governmentwide regulations in existence at the time this Agreement was approved.

Section 2 – Department Regulations

Where any Department regulation conflicts with this Agreement and/or Supplemental Agreement, the Agreement shall govern

ARTICLE 16 – EMPLOYEE RIGHTS

Section 1 – General

In an atmosphere of mutual respect, all employees shall be treated fairly and equitably and without discrimination in regard to their political affiliation, Union activity, race, color, religion, national origin, gender, sexual orientation, marital status, age, or non-disqualifying handicapping condition. Employees will also be afforded proper regard for and protection of their privacy and constitutional rights. It is therefore agreed that Management will endeavor to establish working conditions which will be conducive to enhancing and improving employee morale and efficiency…..

ARTICLE 22 – MERIT PROMOTION

Section 1 – Purpose and Policy

The parties agree that the purpose and intent of the provisions contained herein are to ensure that promotions are equitably and in a consistent manner. Promotions shall be based solely on job-related criteria, and without regard to political, religious, labor organization affiliation or nonaffiliation, marital status, race, color, sex, sexual orientation, national origin, nondisqualifying disabling condition, or age. This article sets forth the merit promotion systems, policies, and procedures applicable to bargaining unit positions in the Department…..

Section 6 – Applicability of Competitive Procedures

A. Promotions – Any selection for promotion must be made on a competitive basis unless it is excluded by Section 7 below……

ARTICLE 40 – ARBITRATION

Section 2 – Conventional Arbitration Procedures

…

F. The arbitrator's decision shall be final and binding. However, either party may file an exception to the arbitrator's award in accordance with applicable law and regulations. The arbitrator will be requested to render a decision within sixty (60) days. Any dispute over the interpretations of an arbitrator's award shall be returned to the arbitrator for settlement, including remanded awards. **…**

ACTICLE 42 – GRIEVNACE PROCEDURE

Section 1 – Purpose

The purpose of this Article is to provide a mutually acceptable method for pro equitable settlement of grievances. This is the exclusive procedure for resolving grievances except as provided in Section 2 and 3. **…**

Section 4 – Jurisdiction

…

If either party considers a grievance nongrievable or nonarbitrable, the original grievance will be considered amended to include this issue. The Department must assert any claim of nongrievability or nonarbitrability no later than the Step 3 decision. **…**

Section 7 – Procedure

…

Employees and/or their representatives are encouraged to informally discuss issues of concern to them with their supervisors at any time. Employees and/or their representatives may request to talk with other appropriate officials about items of concern without filing a formal grievance if they choose. In the event of a formal filing of a grievance, the following steps will be followed:

Step 1. An employee and/or the Union shall present the grievance to the immediate or acting supervisor with an information copy to the Director of the facility in writing within thirty (30) calendar days of the date that the employee or Union became aware or should have become aware of the act or occurrence or anytime if the act or occurrence is of a continuing nature. The immediate or acting supervisor will make every effort to resolve the grievance immediately but must meet with the

employee/representative and provide a written answer within fourteen (14) calendar days of receipt of the grievance.

Step 2. If the grievance is not satisfactorily resolved at Step 1, it shall be presented to the Service/Division Chief, or equivalent management official or designee, in writing, within seven (7) calendar days of the Step 1 supervisor's decision. The grievance must state, in detail, the basis for the grievance and the corrective action desired. The Service/Division Chief, or equivalent management official, or designee, shall meet with the employee and their representative and provide a written answer within (10) calendar days.

Step 3. If no mutually satisfactory settlement is reached as a result of the second step, the aggrieved party or the Union shall submit the grievance to the Director, or designee, in writing, within seven (7) calendar days of receipt of the decision of Step 2. The Director or designee, will meet with the aggrieved employee and their representative within (7) calendar days to discuss the grievance. The Director or designee will render a written decision to the aggrieved party and the Union within ten (10) calendar days after the meeting.

Step 4. If the grievance is not satisfactorily resolved in Step 3, grievance may be referred to arbitration as provided in Article 40, Arbitration. **…**

Section 9 – Failure to Respond in Timely Manner

Should management fail to comply with the time limits at Step 1, the grievance may be advanced to Step 2. Should management fail to comply with the time limits for rendering a decision at Step 2 or Step 3, the grievance shall be resolved in favor of the grievant, provided that (1) receipt of the grievance has been acknowledged by management at the appropriate step in writing and (2) the remedy requested by the grievant is legal and reasonable under the circumstances of the grievance

PERTINENT PROVISIONS OF FEDERAL STATUTES:

CHAPTER 71 OF TITLE 5 OF THE U.S.CODES AS AMENDED

Section 7106, Management Rights

(a) Subject to subsection (b) of this section nothing in this chapter shall affect the authority of any management official of any agency –

(1) to determine the mission, budget , organization, number of employees, and the internal security practices of the agency; and

(2) in accordance with applicable law—

(A) to hire, assign, direct, layoff, and retain employees in the agency, or to suspend, remove, reduce in grade or pay, or take other disciplinary actions against such employees;

(B) to assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted;

(C) with respect to filling positions, to make selections for appointments from

(i) among properly ranked and certified candidates for promotion; or

(ii) any other appropriate source; and

(D) to take whatever action may be necessary to carry out the agency mission during emergencies.

(b) Nothing in this section shall preclude any agency and any labor organization from negotiating –

(1) at the election of the agency, on the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty, or on the technology, methods, and means of performing work;
(2) procedures which management officials of the agency will observe in exercising any authority under this section; or
(3) appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such management official.

GRIEVANCE ISSUES TO BE RESOLVED:

At the commencement of the hearing a parties were unable to submit a joint statement of issues, In accordance with Article 40, Arbitration, Section 2 (E), and the joint stipulation entered into at the hearing, the arbitrator is authorized to determine the issue or issues to be resolved in this matter after hearing the presentations, testimony and receiving the documented evidence.

The Union raised the issue of timeliness under Article 42, Grievance Procedure, Sections 7 and 9 of the Agreement. Also the Agency objected to the authority of the Arbitrator to issue an award that would remove a candidate who had been selected by the agency for a position and then order a make whole remedy that would place the Grievant into the vacated position and order back pay. Since these issues were raised by the parties, in addition to the alleged Agreement violation, all of these issues will be addressed.

Therefore the Arbitrator has framed the following three issues:

1. **DID THE AGENCY VIOLATE ARTICLE 42, GRIEVANCE PROCEDURE, SECTION 7 OF THE AGREEMENT WHEN IT DID NOT MEET WITH OR PROVIDE A WRITTEN DECSION TO THE GREIVANT AND THE UNION AT STEP THREE OF THE GRIEVANCE PROCEDURE?**

2. **DID A VIOLATION OF THE AGREMENT OCCUR WHEN THE AGENCY FILLED THE POSITION OF LEAD PHARMACY TECHNICIAN?**

3. **DOES THE ARBITRATOR HAVE THE AUTHORITY UNDER THE AGEEMENT AND FEDERAL STATURES TO SET ASIDE AN AGENCY HIRING DECISION AND TO ORDER A MAKE WHOLE REMEDY?**

FACTUAL BACKGROUND

Set forth in this Background is a summary of undisputed facts and evidence regarding disputed facts sufficient to understand the parties' positions. Other facts and evidence may be noted in the Discussion below to the extent knowledge of either is necessary to understand the Arbitrator's decision.

The facts in this case are largely undisputed and are hereinafter summarized. Where, however, relevant evidence regarding pertinent facts conflicts, the evidence is summarized.

Sometime prior to April 19, 2002, it was determined by the Agency that there was a need to seek applicants for the position of Lead Pharmacy Technician. The Agency posted the

announcement for the opening for this position in accordance with the standard policies and procedures of the agency's Human Resources Department (hereinafter referred to as the "H.R. Department").

Five internal applicants applied for the vacant position of Lead Pharmacy Technician by submitting their names to the Agency's H.R. Department. A H.R. Department Specialist reviewed each of the applicants' qualifications and all were determined to be qualified for the vacant position. Further, on the first day of the hearing, the parties to this arbitration stipulated that all five candidates were qualified for the position of Lead Pharmacy Technician.

On or about April 19, 2002, a promotion certificated, (hereinafter referred to as the "Cert List") was published listing the five candidates as qualified for the vacant position of Lead Pharmacy Technician. By being placed on the Cert List, the named individuals were determined to have met the basic qualification standards, as provided for by the United States Office of Personnel Management. (AX2)

The chairperson of the Pharmacy Department, Michael Gump, R. Ph., (hereinafter referred to as "Chairperson Gump," authorized the convening of an interview panel to interview each of the candidates. Prior to the actual interviews, Mr. Gump, directed the Outpatient Pharmacy Supervisor, Mr. Dragan Milanovich, to develop job-related questions to be used in the job interviews. Mr. Milanovich delegated the task to Kathy Sherman, an employee in the Pharmacy Department.

Following the development of the interview questions, a panel was convened. This panel was comprised of four members of the Pharmacy Department. The interview panel met and interviewed each candidate and asked the same questions of each of the cert listed candidates. All candidates were scored and those scores were submitted to Mr. Milanovich.. Mr. Gump, the Pharmacy Department Chairperson, did not participate in the

interviews and Outpatient Pharmacy Supervisor Milianovich, who was to have been on the interview panel, did not participate because of the death of his father.

Following the initial interview, a second interview panel for the position of Lead Pharmacy Technician was convened and this panel consisted of three individuals (Michael Darling, Ms. Sherman and Mr. Milanovich) who met and interviewed each of the candidates. Following the second interview, Department Chairperson Gump was told by Mr. Milanovich that two candidates stood out and those two candidates were Mr. David Merritt and Mr. Scott Timiney. However, none of the documentation of either of the two interviews was provided to Chairperson Gump. Mr. Milanovich then recommended to Department Chairperson Gump that Mr. Scott Timiney be given the Lead Pharmacy Technician Position. Following Mr. Milanovich's recommendation, Chairperson Gump selected Mr. Scott Timiney to receive the promotion to Lead Pharmacy Technician Position, effective June 2, 2002.

On May 23, 2002, Mr. David Merritt filed a complaint with the union indicated that he believed that the selection of Mr. Scott Timiney to the position of Lead Pharmacy Technician was a violation of the Agreement. The Union then filed a notice with Chairperson Gump on May 28, 2002, asking that alleged contract violation be corrected. The Union then filed a formal Level One Grievance with Chairperson Gump on June 26, 2002. Mr. Gump responded to the Grievance in a memorandum dated July 2, 2002, denying the Grievance. On July 9, 2002, the Union filed a Level Two Grievance with the Agency's Clinical Service Administrator (hereinafter referred to as CSA) The Agency responded to the Level Two Grievance in a memorandum dated July 31, 2002, denying the Grievance. The Union filed the Level Three Grievance with the Agency's Medical Center Director on August 5, 2002. The Union followed up its Level Three Grievance in a memorandum to the Medical Center Director indicating the Agency had not met with the aggrieved employee and had not rendered a written decision in a timely manner. The Medical Center Director, on August 22, 2002, did file a written response to the Level Three Grievance and denied the grievance. On August 26, 2002, the Union wrote a letter

to the Medical Center Director notifying the Agency of the Union's intent to proceed to Arbitration.

Two days of Arbitration hearing were held at the Carl T. Hayden VA Hospital in Phoenix, Arizona, on November 14 and 15, 2002. Two additional days were scheduled for January 29 and 30, 2003, but the case was concluded on January 29, 2003.

I. Timeliness

Union Position on Timeliness:

The first issue raised at the time of the hearing was raised by the Union and was concerned with the issue of timeliness. The Union stated that the Agency had not responded in a timely manner in accordance with Article 42, Grievance Procedure, Sections 7 and 9.

The Union contends that that the arbitrator must evaluate three issues to determine if the provisions of Article 42, Grievance Procedure, Section 9 have been satisfied. The three issues are: (1) Was management late? (2) Is the requested remedy legal? , and (3) Is the requested remedy reasonable?

Article 42, Grievance Procedure, Section 7, provides for the progressive steps that the Union must take in processing a grievance. This Article list Step 1 as presenting the grievance to the immediate supervisor who has fourteen (14) calendar days to meet with the employee/representative and to provide a written answer to the grievant. If the grievant is not satisfied with the immediate supervisor's response then the grievant may proceed to Step 2 of the process.

Step 2 of the grievance procedure requires that the grievant present his/her grievance in writing to the Service/Division Chief, or equivalent management official or designee within seven (7) calendar days of receiving the Step 1 decision.. The management person

receiving the grievance must meet with the employee and their representative and provide a written answer within (10) calendar days. If no mutually satisfactory settlement is reached as a result of the second step of the grievance procedure, the aggrieved party or the Union can submit the grievance to Step 3 of the grievance procedure.

The Union contends that both the Union and the Agency followed the steps of the grievance procedure through Step1 and Step 2 of the procedure. The Union issue in this arbitration, regarding timelessness, comes at Step 3 of the grievance procedure. Step 3 of the grievance procedure requires that the grievant or the Union submit the grievance in writing to the Director, or his/her designee within seven (7) calendar days of receipt of the decision at Step 2 of the procedure. Article 42, Grievance Procedure, Section 7, Step 3 states in relevant part:

> "…The Director or designee will meet with the aggrieved employee and their representative within seven (7) calendar days to discuss the grievance. The Director or designee will render a written decision to the aggrieved party and the Union within ten (10) calendar days after the meeting."

The Union contends that the timelines at Step 3 of the grievance procedure are twofold because the language of that section of the Agreement requires a meeting within seven (7) calendar days of receipt of the grievance and that a written decision must be given with in then (10) calendar days of the meeting. The Union believes that the Agency has violated Article 42, Grievance Procedure, Section7, Step 3 because the Agency did not hold a meeting or respond within the timelines provided for by this section of the Agreement.

The Union stated that it delivered the Step 3 grievance to the Medical Center Director's office on August 5, 2002, and that the Director's secretary had dated and initialed the grievance. The Union further contends that on August 16, 2002, the Union notified the Medical Center Director that no meeting had been held nor had any reply been received,

and that because the Agency had violated the timelines of the grievance procedure, the grievance had to be resolved in favor of the grievant. (UX 2, page 2)
The Union indicated that on August 19, 2002, it received an Outlook message from the Agency's H. R. Department scheduling a meeting on August 21, 2002, to discuss the issues of the Lead Pharmacy Technician position. (UX 5, page 3)

The Union stated that the Medical Center Director indicated on August 22, 2002, that he was not aware of being late with the level three meeting or the written decision. The Union stated that the Agency did not request an extension of the time limits as provided for in Article 42, Grievance Procedure, Section 8 which provides than any step of the grievance procedure may be extended by mutual consent of the parties. The Union indicated that it had not mutually agreed to any request for an extension of the timeline at Step 3 of this particular grievance nor did they acquiesce by conduct to any extension.

The Union presented a prior arbitration decision by arbitrator Sarah Adler that had resolved a prior arbitration in favor of the Agency because the Union had failed to process it's grievance in a timely manner. (UX 5, page 6-7) Further, the Union relied upon another arbitrator's decision wherein the arbitrator had found that the Department of Veteran Affairs had violated the Agreement when it failed to respond in a timely manner to a grievance. [Dept. of VA and AFGE Local 1045, 57 FLRA No. 24, (April 9, 2001).]

The Union relied upon Article 42, Grievance Procedure, Section 9, to support its contention that the Agency violated the terms and conditions of the Agreement and that the Union should prevail on the technical violation of the Agreement without regards to the merits of the case. Article 42, Section 9 of the Agreement reads in relevant part:

> "…Should management fail to comply with the time limits for rendering a decision at Step 2 or 3, the grievance shall be resolved in favor of the grievant, provided that (1) the grievance had been acknowledged by management at the appropriate step in writing and (2) the remedy requested by the grievant is legal and reasonable under the circumstances of the grievance."

The Union stated that the grievance was delivered to the Medical Center Director on August 4, 2002 and that the Director's secretary acknowledged receipt by dating and initialing the grievance. (UX 5, page 1) The Union contends that the Agency did not schedule a meeting nor render a written decision within the time limits provided for in Article 42, Grievance Procedure, Section 9, of the Agreement. Due to these alleged violations of the Agreement the Union has asked that the case at bar be resolved in the Unions favor.

Agency position on Timeliness:

The Agency responded to the Union timeliness issue in two ways. The first defense to the timeliness issue was that the Union and the Agency had by conduct extended the timelines, because a meeting between the parties did occur on August 16, 2002, and that a written response from the Medical Center Director was issued and dated August 22, 2002. (AX 7 and UX 4) The second defense relates to Article 42, Grievance Procedure, Section 9, wherein the Agreement that at Step 3 of the grievance the Director must acknowledge receipt of the grievance in writing and also requires that the remedy requested by the grievant must be legal and reasonable under the circumstance of the grievance for this section of the Agreement to award a decision to the grievant.

With regard to the first defense the Agency claims that the Medical Center Director did agree to a meeting with the grievant at the Step 3 level and that this meeting and his written response of August 22, 2002 waived any issue of timeliness. The Agency further claims that the Union had acquiesced to the extension of the time limits by voluntarily and actively participating in the August 16, 2002, meeting.(AX 7 and UX 4) The Agency's position is that the meeting on August 16, 2002, was scheduled for the expressed purpose of discussing the merits of the grievance, and that by attending the meeting the Grievant and the Union had given their consent to an extension of the Step 3 timeliness. The Agency advances the proposition that there is nothing in the written language of Article 42, Section 9, that requires that the extension of time requires a

written agreement, and that therefore, the grievant and Union's participation in the meeting was an agreement by conduct to allow for the extension of time.

The second defense to the Union's position on timeliness is the expressed language of Article 42, Grievance Procedure, Section 9, which requires that in addition to the Agency having to acknowledge the grievance at the appropriate step of the grievance procedure, the remedy requested must be both legal and reasonable under the circumstances of the grievance. The Agency contents that the receipt of the grievance by the Director's secretary fully satisfied the requirement of providing adequate acknowledgement. Also the Agency's position is that the Union position fails because it does not take the factual situation surrounding the grievance into account and that therefore, the Union's requested remedy is illegal and unreasonable in the totality of circumstance. Further, the Agency relies upon the statutory provision of 5 U.S.C. Chapter 71, Section 7106 (a) (2) (c), which it believes provides the Agency's management the authority, in accordance with applicable laws, to fill position(s) and to make selection(s) for appointment from among properly ranked and certified candidates for promotion without the involvement of the Union. The Agency believes that the Union's desired remedy is a violation of its absolute right and authority to promote a person from a properly produced and ranked certification list.

Discussion and Findings regarding timeliness:

The pertinent language that is found in Article 42, Grievance Procedure, Section 9, is as follows:

> "Should management fail to comply with the time limits at Step 1, the grievance may be advanced to Step 2. Should management fail to comply with the time limits for rendering a decision at Step 2 or Step 3, the grievance shall be resolved in favor of the grievant, provided that (1) receipt of the grievance had been acknowledged by the management at the appropriate step in writing and (2)

the remedy requested by the grievant is legal and reasonable under the circumstances of the grievance."

The language of Article 42, Grievance Procedure, Section 7 of the Agreement, provides that at Step 3 of the grievance process, it is a requirement and obligation that the agency holds a meeting with the grievant and the Union within seven (7) calendar days of the Step 3 filing. It is a further requirement and obligation that the Agency provide a written decision regarding the grievance within ten (10) calendar days after the meeting to the grievant and to the Union. These two requirements are clear and concise and are in no way ambiguous.

To fully understand how the provisions of Article 42, Grievance Procedure, Section 9 of the Agreement, come to affect a grievance one has to understand how that Section 7 of that article works. The relevant language of Article 42, Section 7 is as follows:

> ...
> Step 3. If no mutually satisfactory settlement is reached as a result of the second step, the aggrieved party or the Union shall submit the grievance to the Director, or designee, in writing, within seven (7) calendar days of receipt of the decision of Step 2. The Director or designee will meet with the aggrieved employee and their representative within (7) calendar days to discuss the grievance. The Director or designee will render a written decision to the aggrieved party and the Union within ten (10) calendar days after the meeting. (emphasis added)

The Union has provided convincing evidence that the Medical Center Director was provided the grievance in a timely manner, but that he failed to conduct a meeting with the grievant or to provide a written decision within the timelines provide for in accordance with Article 42, Section 7 of the Agreement. The Agency's defense to the late filing was to suggest that the late filing was corrected when the Union and grievant voluntarily met with the Medical Center Director on August 16, 2002, and the Medical Center Director provided a written decision dated August 22, 2002. It is my opinion meetings that are held outside the timelines of Article 42, Section 7 do not constitute a

waiver unless such waiver is mutually agreed to in writing. Had the Medical Center Director met with the grievant and responded in a timely manner this would not have become an issue in this proceeding or if additional time was need to process the grievance then the Agency should have made a proper request for extension of the timelines.

The language of Article 42, Grievance Procedure, Section 9 clearly and unambiguously states that if the Agency does not timely acknowledge receipt of the grievance, meet with the Grievant, and then provide a written decision in a timely manner that the grievance "shall" be resolved in favor of the grievant.(emphasis added) If the language were to stop there the decision in any grievance filed by the Union and not timely processed by the Agency at Step 2 or Step 3 of the grievance procedure would result in Grievant being granted his/her requested remedy. The problem with making a blanket award to the grievant is found in the two conditions that are required to be met prior to granting the grievant an award based upon the Agency not timely processing the grievance. The two conditions are: (1) the acknowledgement by the Medical Center Director of the grievance and (2) that the requested remedy is both legal and reasonable.

The Union believes that at Step 3 of the grievance procedure, that the Medical Center Director may not have provided a written acknowledgement of the grievance when his secretary dated and signed the acceptance of the grievance. One could argue that the requirement that the acknowledgement be in writing is not adequately provided for by the mere signing and dating of the grievance by the office secretary. On the other hand, there is nothing in the Agreement that would give this arbitrator any guidance as to what would constitute an adequate written notice. This Arbitrator recognizes that the parties have had a long history of filing and processing grievances therefore without evidence provided to the contrary, it appears that the Medical Center Director's secretary was acting as a designee when she dated and initialed the grievance, therefore satisfy the requirement that the acknowledgement be in writing.

However the more problematic portion of Article 42, Grievance Procedure, Section 9, is the provision that requires that the remedy requested by the grievant be legal and reasonable under the circumstances of the grievance. This provision allows for wide discretion in what constitutes a "legal and reasonable" remedy.

The Union has contended that granting the grievant his requested remedy, based upon the violation of the grievance procedure timelines, is legal and does not interfere with the rights of management. The Union bases this contention on language found within the Agreement, Regulations and Federal statures that prohibit bias and preselection with regards to promotions.

The Agency counters the Union's contention that an award based on timeliness would be legal by indicating that in the administration of all matters covered by the Agreement, that officials and employees "shall" be governed by applicable Federal statutes (emphasis added). Also the Agency contends that the parties to this proceeding are governed by Governmentwide regulations that existed at the time the Agreement was bargained and ratified which also grants them exclusive management rights regarding promotional process and selection of personnel for promotion.

The Agency relies upon Chapter 71 of Title 5, Sections 7105 and 7106 of the Federal Labor Relations Authority (FLRA) concerning management rights under the statute that prohibit Federal Agency from engaging in collective bargaining with respect to conditions of employment that are reserved as a management rights. Further, the Agency relies upon Chapter 71 of Title 5, Section 7106 (a) that states in relevant part that, "nothing in this chapter shall affect the authority of any management official of any agency to perform any of the functions (e.g. determining the mission, budget, hiring, assigning work, etc.) delineated in that section. The Agency claims that the Grievant's requested remedy is illegal because it would impinge on the rights of management to fill positions and make appointments from properly ranked and certified candidates for promotion which is prohibited by statute.

In addition to the requested remedy having to be legal it also has to be "reasonable" under the circumstances of the grievance. The Union contends that the grievant's requested remedy is reasonable because it merely provides for the reconstruction of what management would have or should have done had management not allegedly violate the Agreement, however the reasonableness of the Grievant's requested remedy must be tested by the totality of circumstance test..

Congress has granted statutory rights to management in federal agencies to hire, promote, and undertake other actions and have declared that these statutory rights are reserved or retained in management and are a prohibited subject of bargaining. To overcome these statutory management rights a grievant must find an exception to the rule that would limit or restrict management rights. Unless such an exception can be found an arbitrator cannot grand an award that would provide for a remedy that would encroach upon these rights. Under provisions of 5 USC, Section 7106, the Agency and Union are prohibited from bargaining on the selections for appointment from among properly ranked and certified candidates for promotion. Since this prohibition exist then even if language existed in the Agreement that was contrary to the statute an arbitrator would be without authority to order an award that would infringe upon management's statutory rights, [5 FLRA 763 (1987) and 46 FLRA 1404 (1993).] Further, any language in the Agreement that would violate the rights of management as provided for by statute would not be enforceable.

It is a familiar principle that the law abhors forfeiture. If an agreement is susceptible to two constructions, one which would be forfeiture and the other would not, the arbitrator will be inclined to adopt the interpretation that will prevent the forfeiture. With regards to the issue of "timeliness" of a grievance, it has been a long standing principle of labor law that a forfeiture of a grievance based on missed time limits should be avoided whenever possible, 95 LA668, 673 (1990). If the expressed terms of the Agreement are ambiguous with regards to time limits or if there are conditions that must be met to allow for a forfeiture, then the ambiguity should be resolved in favor of timeliness.

For the reasons stated above I have concluded that the Agency management acted reasonably because they did not feel that the grievance remedy requested by the grievant was legal and reasonable under the circumstances of the grievance. Further, the parties did meet on August 16, 2002 and discussed the merits of the grievance and the Medical Center Director did provide a written decision date August 22, 2003, which allowed the parties to proceed to arbitration on the merits of the case. Therefore the grievant's request that his desired remedy be granted is hereby denied.

II. Violation of the Agreement

Union Position and Agency Positions on Agreement Violations:

The Union contends that Article 16, Employee Rights, Section 1, provides language that requires that employees be treated fairly and equally. (JX 1) The relevant provisions of Article 16 are as follows:

> "In an atmosphere of mutual respect, all employees shall be treated fairly and equitably and without discrimination in regard to their political affiliation, Union activity, race, color, religion, national origin, gender, sexual orientation, marital status, age or non-disqualifying handicapping conditions."…

1. Pre-selection issue:

The Union contends that the Agency, by its conduct and statements attributed to Supervisor Dragan Milanovish, gave unfair advantage to Mr. Scott Timiney when he was selected for promotion to the Lead Pharmacy Technician. Testimony provide by Union Witness Teresa Austin was that one year prior to the posting of the Lead Pharmacy Technician position that Mr. Milanovich commented to her of his intent to promote Mr. Timiney to that position. Further testimony was given that indicated that Mr. Milanovich had made public comment regarding his friendship with Mr. Timiney and his desire to

give Mr. Timiney the promotion once it came available. It is the Union position that Mr. Milanovich was predetermined to select Mr. Timiney when the Lead Pharmacy Technician was posited and these comments constitute a pre-selection in violation of the Agreement, Agency regulations and Federal Statutes. The union contention is that the selection of Mr. Timiney occurred prior to list of properly ranked and certified candidates for promotion was created by the Agency's H. R. Department and was not based on the relative ability, knowledge and skills of the candidates on the certificated list.

The Agency contend that the selection official for the position of Lead Pharmacy Technician was not Mr. Milanovich but Department Chairperson Michael Gump and therefore no matter what Mr. Milanovich may have stated publicly that it was not Mr. Milanovich's position or duty to make the final selection. The Agency contend that there was no testimony given that would indicate that the actual selecting official, Department Chairperson Michael Gump had by public statement or by conduct showed any favoritism or effort to make a pre-selection of any of the candidates listed on the certificated list. The Agency believes that any friendship or personal relationship that existed between Mr. Milanovich and Mr. Timiney did not affect the selection process because Mr. Milanovich was not the selecting official.

2. <u>Agency regulations issue:</u>

The Union contends that under Agency regulations, Policy Memorandum No. 05-29, July 2, 2001, (JX 3) at Paragraph 3d, Fairness in Selection requires that "Selection officials and others engaged in the promotion process will make certain that nepotism, favoritism and pre-selection are not involved in any promotion action taken under this plan". The Union believes that the Agency's administrative rules require the selecting official to make certain that favoritism and preselection are not involved in any promotion action. The Union contends that the Agency failed to meet the fairness criteria when the selecting official, Department Michael Gump, empowered an interview panel and that he allowed Mr. Dragan Millanovich to be an integral part of that panel. The Union believes that Mr. Milanovich's personal friendship with Mr. Timiney and the fact that he recruited

Mr. Timiney for employment polluted the panel and constitutes favoritism and pre-selection.

The Agency denies that it has taken any action that could be construed as engaged in a promotional process that involved nepotism, favoritism and/or preselection. The Agency contends that it has, through out the process of selecting a person to fill the Lead Pharmacy Technician position, taken all the necessary steps to insure that the promotional selection was fair and just.

3. <u>Right of the agency to select</u>:

Both the Agency and the Union made comments during the arbitration hearing and in their respective arbitration briefs that the Agency's management were free to select whomever they wished from a properly ranked and certified list of eligible candidates. The disagreement between the parties was created when the Department Chairperson Michael Gump received the certified list of five qualified individuals and decided to have an interview panel interview each of the candidates. Testimony was provided by witnesses for both the Agency and the Union that indicated that the certified list that was sent to Mr. Gump was created by the Agency H.R. Department under its normal procedures and that the list contained the names of five employees within the department that were considered qualified to be interview for the promotion.

Department Chairperson Michael Gump, asked Mr. Milanovich, the Outpatient Pharmacy Supervisor, to create a series of job related questions that could be used by the interview panel that would insure that all candidates were asked the same questions. The assignment to actually develop the questions that were to be used in by the interview panel was assigned to Kathy Sherman an employee in the pharmacy department. Ms. Sherman did develop the questions and they were used in the interview process.

4. Interview Panel:

The initial interview panel was designed to have four members from the pharmacy department and Mr. Milanovich. Due to a death in the family, Mr. Milanovich did not participate in the initial interview but the other four panel members did interview the five candidates. Testimony was provided by member of the initial interview panel that each of them individually ranked the candidates and that these ranking sheets were returned to Mr. Milanovich. The former panel members testified that they had been informed, following the interviews that a tie in the ranking existed between two of the five candidates. It was later determined that Mr. Scott Timiney and Mr. David Merritt had been given an equal rating through the first interview process.

Upon Mr. Milanovich's return to work following his bereavement leave, he asked Department Chairperson Gump if he could convene a second interview panel. The second interview panel was authorized and consisted of three individual, two from the first interview panel and Mr. Milanovich. Following the second interview of the candidates Mr. Milanovich recommended to Mr. Gump that Mr. Scott Timiney be given the promotion.

Department Chairperson Gump testified that he was given the list of certified candidates but did not receive any ranking or other information from either the first of second interview panel. Mr. Gump further testified that he was the sole person to make the selection and that his use of the interview panels did not empower or authorize either of the two panels to make the final decision as to which candidate would be given the promotion. Mr. Gump, also indicated that there was nothing in the Agreement or Agency policies that would require him to use an interview panel and that he had created the interview panel to allow persons to participate in the process and that he used it as a learning process. Mr. Gump's and other Agency witnesses testified that there were no established rules or policies on the use of interview teams and that the use of the interview process was at the discretion of the department manager. The Agency contended that there was nothing in the Agreement that authorizes or forbids the use of

interview panels. Mr. Gump and other Agency managers testified that they were free to select any of the qualified candidates from a certified list of qualified candidates without the involvement of the Union or an interview panel. Further, the Agency contends that the interview was but one aspect of the overall selection determination and that the any recommendation from an interview panel is non-binding on the selecting official.

The Union contends that when Mr. Gump decided to use an interview panel that the Agency forfeited it right to make the selection from the certified list of qualified candidates. The Union believes that the Agency used the interview panel because they somehow feared a third party action and that the panel was an attempt to disguise their intention of pre-selecting Mr. Timiney over any of the other qualified candidates.

5. <u>Other contention by the union</u>:

The Union contends that 5 USC 23, Merit System Principles, is a statutes framework that requires the Agency to be fair in selection and advancement of personnel. The Union relied upon 5 USC, Section 2301 (b)(1), that requires that the selection and advancement of personnel be determined solely on the basis of relative ability, knowledge and skill, after fair and open competition which assures that all candidates receive an equal opportunity and Section 23001 (b)(8), that requires that employees be protected from arbitrary actions and personal favoritism. Also, 5 USC, Section 2302 (b)(4) prohibit personnel practice that deceive or willfully obstruct any person's application for a position and 5 USC, Section, 2302 (b)(6) states that it is a prohibited personnel practice to grant any preferences or advantage not authorized by law. Additionally, the Office of Personnel Management (OPM) regulates the merit promotion and states that the promotions shall be based solely on job related criteria. [5 USC 335.103 (b)]

The Agency contend that it's Merit Promotion Plan (JX 3) reflects the non-negotiable management right to select or non-select candidates from a properly ranked and certified promotion list. Further, that Agency believes that the Agreement provides the Agency the right to select candidates for promotion. It is the contention of the Agency that there is no

conflict between the Merit Promotion Plan and the Agreement with regards to the right of the Agency have the undisputed right to make promotion selections.

The Agency contends that all qualified candidates for promotion are referred for consideration unless there is a sufficient number to require a ranking by a promotion panel (i.e., 8 or more candidates for nonprofessional bargaining unit positions or more than 10 candidates for non-supervisory professional unit and non-bargaining unit positions). The Agency contends that this is the only mention of a panel within the Agreement and that since there were only five qualified candidates for the position of Lead Pharmacy Technician that all five were referred without the need for a ranking panel. Further, the Agency contends that the only mention of seniority with regard to breaking a tie breaking is found in Article 22, Merit Promotion, Section 10 (C)(2)(c), wherein it states that if a panel for competitive action is instituted to assist in the pairing down the list of ranked promotion candidates at the break point to determine if an individual candidate will be either placed or not placed on the certified list then their length of service with the VA will be used as the method to break the tie.

6. <u>Unfair and inequitable treatment</u>:

a. <u>Salary</u>

The Union contends that the Agency had given an unfair advantage to Mr. Scott Timiney in several areas. The Union contends that when Mr. Timiney was first employed, in August of 2000 that he was given the entrance pay rating of GS 6- 6 instead of a placement at the entrance level as a GS 6-1. The Union believed that this constituted a discriminatory, unfair and inequitable treatment and that such salary placement was contrary to the Agreement and was an indication that the agency showed favoritism to Mr. Timiney.

The Agency contends that the placement of individual on the salary schedule at the time of hiring is market driven and that the Agency regularly recruits individual and to entice

them into coming to work at the VA facility that the salary offer is enhanced . The Agency contends that the placement of Mr. Scott Timiney on the salary schedule as a GS-6 was not discriminatory, unfair nor contrary to any provision of the Agreement or any statute dealing with prohibited personnel practices.

b. Overtime:

The Union contends that Department Chairperson Michael Gump and Supervisor Dragan Milanovich showed favoritism to Mr. Timiney by giving him more overtime than other members of the department. The Union believes that this favoritism regarding overtime shows that management was predisposed to give Mr. Timiney the Lead Pharmacy Technician position.

The Agency contends that no employee who requested overtime had ever been turned down. Further, there were several employees who had been asked to do overtime whenever there was additional work to be performed in the Pharmacy. It is the Agency position that since any employee who had asked to work overtime had been accommodated that no one has been unfairly treated or than any favoritism has been shown to Mr. Timiney.

c. Friendship

The Union contends that the allege friendship that exist between Mr. Milanovich and Mr. Timiney was evidence that Mr. Timiney was given preferential treatment with regards to initial salary placement, overtime and the promotion to Lead Pharmacy Technician. The Union supported it contention that a friendship exit between these parties because Mr. Milanovich and Mr. Timiney had worked together at another hospital and that Mr. Milanovich had recruited Mr. Timiney to the VA facility.

The Agency contends that the friendship between Mr. Milanovich and Mr. Timiney did not support the Unions contention that Mr. Timiney's selection for the promotion to Lead

Pharmacy Technician was preferential treatment. The Agency position is that the Union failed to draw a nexus between any friendship that does exist between Mr. Milanovich and Mr. Timiney and the fact that Mr. Timiney was granted the promotion. The Agency contends that the mere fact two people are friends and have a social relationship is not proof in of itself that anyone has been given preferential treatment. The Agency argues that to deny a person a promotion because of a personal friendship or a social acquaintance would in and of itself be contrary to all the merit principles in the federal system.

Discussion and Findings regards Violation of the Agreement:

The bases of this grievance is found in the language of Article 16, Employee Rights, Section 1 of the Agreement. The Union has indicated that the Agency had violated the rights of the grievant when it filled the position of Lead Pharmacy Technician and that the process use did not treat the grievant in a fair and equitable manner. The Union further cited both Agency regulations and a number of federal statutes dealing with the Merit Promotion Principles that require that the Agency select individual for promotions based on job criteria, the knowledge, skill of the applicants and that the selection process be free from bias and favoritism.

The first analysis of this grievance is to review the Agreement to determine if there has been a violation of the specific language of any Article of the Agreement and to determine if that violation has resulted in the violations of the grievant's rights under Article 16 of the Agreement. The mere accusation that someone has been denied rights cannot sustain an arbitration award unless the accusation is supported by relevant and reliable evidence.

The first question that I must ask is, what are the normal hiring and promotion process within the Agency? Through the evidence that was provided at the hearing, from both witnesses and from submitted documents, and from the statements of both Union and Agency counsel during the hearing and in their post hearing briefs it was well established

that the Agency management was free to select whomever they wished from the certified list of applicants.

The language of Article 22 of the Agreement, Merit Promotion, provides for a method to be used by the Agency's management to announce a vacancy and to accept application. This article of the Agreement further provides for a process to be used by the Agency's H.R. Department to develop a certified list of qualified applicants that would be sent to the selecting official for consideration. It appears from the testimony that this process was followed and was in no way violated by the Agency.

The Agreement expressly states in Article 2, Governing Laws and Regulations, that with regards to all matters covered by the Agreement, that officials and employees will be governed by applicable Federal statutes and by Government-wide regulation. To fully understand the rights of individuals this arbitrator must look beyond the four walls of the agreement and look at applicable Federal statutes and regulation that help bring clarity to the expressed terms of the Agreement.

Under 5 USC, Section 7106, (a)(2)(C), the rights of management to hire and promote are clearly delineated. This statute states that nothing shall affect the authority of any management official to carry out the various management functions that are therein cited. Several of the functions made reference in the statute include the filling of positions, and the making of selections for appointment from among properly ranked and certified list of candidate. This statute provides that the rights of management are rights that cannot be interfered with by terms of a collective bargaining agreement.

While the Agreement, Article 42, Grievance Procedure, provides for a broad definition of what constitutes a grievance, there are strong protections that exist against narrowing the federal agency management right of action and against disregarding certain laws, rules, and regulations. Under the FLRA collective bargaining is prohibited on numerous important matters in the federal sector that are mandatory subjects of bargaining in the private sector. In the federal sector bargaining is merely permitted and not required on

certain important matters in the federal sector that are mandatory subjects of bargaining in the private sector. Also, in the federal sector the duty to bargain is not extended to matters that are the subject of certain rules or regulations. Due to this prohibition, even though the definition as to what is grieveable may be very broad the grievance may not be sustainable if the grievance stands on contract provisions dealing with a subject excluded from bargaining by statue or if the grievance deals with a subject that infringes upon a statutory safeguarded management rights or if the grievance would infringe upon certain laws, rule or regulations.

Federal statutes expressly state that federal sector employees have the right to engage in collective bargaining with regards to conditions of employment. This right is not absolute because the same federal statute provides that certain subjects are in effect prohibited by the management rights section of the Act, which state that nothing in the law that governs collective bargaining shall affect the authority of management rights as provided for in the stature. By law the rights and authority of management are reserved and retained under the management rights provision of the Act and can not be bargaining away.

The provisions of 5 USC, Section 7106, Management Rights, (b), states that nothing in the law that governs collective bargaining for the Agency "shall" affect the authority of any management official of any agency to do certain cited function. This Federal statute provides among other things that management shall have the right, in accordance with applicable laws, to fill position and to make selections for appointment from among properly ranked and certified candidates for promotion.

The statutory phrase, "in accordance with applicable laws", may limit management rights and if so, then certain rights of an employee could be properly enforced by a contractual grievance and arbitration proceeding. Normally, employee rights that would be enforceable under this language would be collectively bargained procedural processes that are affected by management exercising their management right. This type of contract language normally deals with implementation bargaining or impact bargaining. [(35 A.F.L. rev. 129,133 (1991]

There has been considerable litigation on what constitutes a permissible encroachment into management rights through the bargaining of contact language, and what is impermissible interference with the statutory rights of management? The courts have consistently ruled that collective bargaining contract clauses that are inconsistent with management's reserved rights are unenforceable. [83 LA 1219 (1984)] It is also a well established principle of labor law that the overriding force of federal sector management rights cannot be bargained away because the rights are absolute. [6 FLRA 466 (1981); 25 FLRA 520 (1987)] Also if contract language does infringe upon statutory management rights the FLRA can give a ruling to set aside of modify remedies imposed by an arbitrators that infringe on management's statutory rights. [5 FLRA 763 (1981; 46 FLRA 1404 (1993)]

In the case at bar it is clear that management has a right to select and promote individuals from a properly ranked and certified list of eligible candidates. Through stipulation of the parties and though extensive testimony it was determined that the five candidates that were interview and sent to Department Chairperson Gump were from a properly ranked and certified list of eligible candidates. Nothing presented in the hearing would indicate that there was anything procedurally wrong with the way in which the certificated list was created and therefore there would be nothing that would allow a permissible encroachment into management's statutory right to select and promote a person from the certified list to the position of Lead Pharmacy Technician.

The issue of the interview panel was a pivotal argument in the Union case. In reviewing the entire Agreement and looking at all the exhibits, I found nothing that either authorized or denied management from using an interview panel. Further, I found nothing in the way of procedures, processes, guidelines, policies, rules, regulations, laws or contract provisions that would govern how an interview panel is formed or used in an interview process, where the ultimate decision as to who will gets the job is that of the selecting official. The Agency provided a number of department managers who testified and described different methods of how they had used interview panel. The common

theme throughout their testimony was that the interview panel was not a requirement under the selection process and if used it was only one consideration in determining promotional selection and that interview panels recommendations where not binding on the final decision of the selecting official.

While the Union raised the issue that the panel somehow took away the rights of management to make the final determination as to who would get the promotion, I do not believe that the mere use of an interview panel interferes with the statutorily mandated management rights associated with the selection of individual for promotion. Further, I have found nothing in the Agreement, applicable regulations or statute that would be permissible interfere with this management right.

The Union argued that since a tie existed in the first interview panel that the grievant should be given the promotion based upon his seniority. The only reference in the Agreement to hire date as a form of a tie breaker appears in Article 22, Merit Promotion, Section 10 (C)(2)(2)(c), where the length of service with the VA will serve as a tie breaker when it is necessary to determine the best qualified list of candidates for referral. The use of the tie breaker does not occur at an interview panel but is use to create the certified list of eligible candidates for consideration for the promotion. Therefore the fact that there was a tie between Mr. Timiney and Mr. Merritt at the end of the first interview session has no significance in the arbitration.

The one possible encroachment on management's right to make a promotional decision would be if the action was contrary to applicable law such as Federal Statutes, Agency regulations or permissible provisions of the Agreement that limit management's right. I have found nothing that would show that the actions of the Agency was violative of any statute, regulation of term of the Agreement as to restrict managements right to select an individual for promotion from a certified list of candidates.

The Union has relied upon 5 USC 23, Merit System Principles that would require that the Agency action in making promotional selections to be based on job criteria, the skills

and knowledge of the eligible applicants, that it be fair, and not be a prohibited personnel practice. The Union has challenged management right to have selected Mr. Timiney for promotion because it considered the selection to be unfair and a prohibited personnel practice. It was clear from the evidence that when the Agency's H.R. Department put together the certified list that no one objected that the process violated any "applicable laws". Again, the skills and knowledge of all five applicants were not in questions at the time of the hearing.

The Union indicated that Mr. Timiney had received special treatment from Mr. Milanovich with regards to his initial placement on the salary schedule, the assignment of overtime and the fact that the two gentlemen were allegedly social acquaintances.

The initial placement of Mr. Timiney on the salary schedule (GS 6-6) was explained through testimony that indicated that it was standard procedure to offer individuals higher placement on the salary schedule than the entry level position (GS 6–1) to attract talent and to compete with other hospitals pay schedules within the community. Testimony was also given that that throughout the medical facility that other individuals had been given higher than entrance level placement when hired by the Agency. It is my opinion that the placement of an individual on a higher than entrance level salary position is not a per se indication that individual has been given an unfair advantage.

The Union provided testimony that Mr. Milanovich had received a disproportionate amount of the available overtime within the department. The Agency provided witness that indicated that whenever overtime was available that no employee that requested to work overtime had ever been turned down. Further, the Agency indicated that on some occasions individuals had been asked to work overtime to perform tasks that needed to be performed in the Outpatient Pharmacy. In reviewing the distribution of overtime and the testimony of the witnesses, I must conclude that there was no proof that Mr. Timiney had been given an advantage over other employees within the department. The mere perception that Mr. Timiney had been given a preferred right to benefit does not rise to the level that would indicate that management rights were somehow diminished.

The Union believes that the alleged friendship that exists between Mr. Timiney and Mr. Milanovich constituted an unfair advantage for Mr. Timiney when the position of Lead Pharmacy Technician was filled. The fact that Mr. Milanovich did not participate in the first interview panel and then upon his return from bereavement leave reconstituted a second interview panel does appear to somehow not be a fair and reasonable use of the interview process. Even though the interview panel is not a requirement to be used in the selection process for promotion it would seem that if management is to initiate its use then the process should be done in such a way that there would never hint that the process was somehow flawed. Had Mr. Milanovich been able to participate in the first panel there would have been five people on the panel and that would have allowed for an uneven number that would have given an appearance of fairness. The real question of the appearance of fairness comes when the second interview panel was convened by Mr. Milanovich and only two of the original panel members were invited to participate and Mr. Milanovich choice to participate; this once again had the appearance that the interview process was something less than fair. The question that comes to mind is if there was a tie in the first panel did Mr. Milanovich select only those persons that he knew would rank the candidate in the same manner that he would? Once again this question raises the ugly notion that the panel may have been manipulated to a particular end result. To complicate matters further, the ranking from both the first and second interview panels were never provided to Department Chairperson, Michael Gump, who was the selecting official. Testimony was given by Mr. Milanovich, that instead of giving Mr. Gump any type of ranking that he merely informed the selecting official that his choice of candidates was Mr. Timiney. I do not question the selection of Mr. Timiney because clearly he was a qualified candidate that was duly selected by the selecting official, I question the process that appears on its face to have been less than fair and that the use of the interview panel may have been nothing more than a sham.

Even if the involvement of Mr. Milanovich in the interview process was questionable this does not mean than Mr. Milanovich had the power or the authority to make the final selection for promotion of a qualified candidate to the position of Lead Pharmacy

Technician. The actual person that was responsible for the selection for promotion was the Department Chairperson, Michael Gump and there was no evidence presented that would indicate that his selection was based upon Mr. Milanovich's alleged friendship with Mr. Timiney. If Department Chairperson had been given the rankings of the two interview panels there would be less of a question as to how much weight did Mr. Milanovich's recommendation that Mr. Timiney be given the promotion have on selecting officials final decision?

In looking at the issues raised by the Union regarding Mr. Timiney's the initial salary placement, the granting of overtime to him and the alleged friendship that exist between he and Mr. Milanovich, I find that these issues would not deny the Agency the right to select anyone of the eligible candidates on the certified list for promotion to Lead Pharmacy Technician. When I exam all of the accusation I find nothing that would deny management the right under 5 USC, Section 7106 to make the promotion selection. Therefore it is my opinion that the Union has not met its burden of proof by showing that the Agency had made a decision that was not in accordance with applicable law. It is clear that the Agency's had the absolute right to selection any one of the five eligible persons who appeared on the certified list for the promotion to Lead Pharmacy Technician.

III. Does the Arbitrator have Authority?

The Agency raised the issue that the arbitrator is without authority to render a binding decision with regard to rights reserved under 5 USC, Section 7106 and that the arbitrator lack authority to issue a make whole order that would result in the grievant being awarded back pay. It is the contention of the Agency that even if a violation of the Agreement is found that the grievant's demand to be made whole is outside the arbitrator authority to award a make whole remedy.

As pointed out earlier in this opinion, the Agency's management has certain management rights that are not mandatory subjects for bargaining. Many of those management rights are outlined in 5 USC, Section 7106, Management Rights, and can not be bargained away. Even if the Agency were willing to grant bargaining rights to the Union on issues covered under this statute any language that would be a result of such bargaining would be unenforceable. Yet, 5 USC 7106 (b) states that nothing in this section shall preclude any agency and any labor organization from negotiating within in certain defined areas.

The Union and the Agency can bargain on issues relating to management rights so long as the proposals are related to procedural and not substantive management rights. The courts have concluded that the determination as to what proposal is procedural or substantive must be left to the FRLA. [885 F.2d 911, 124 LRRM 2425 (D.C. Cir., 1987)] The FLRA has devised a number of standards or "test" to help in distinguish between procedural and substantive proposals. Generally, the bargaining on procedural issues that deal with implementation bargaining or impact bargaining must have more than a minimal impact on bargaining unit members to be considered a valid encroachment on statutory management rights.

In the case at bar there is nothing in the evidence that would indicated that there was contract language that would be procedural in nature that would help the grievant to realize his remedy. I have found no language that would authorize me as the arbitrator to order that the grievant be given the position of Lead Pharmacy Technician. Yet, if valid language regarding procedural issues did exist that language may have warranted the award of the grievant requested remedy. It is my opinion that under the terms of the Agreement and in accordance with relevant Federal statutes I would as the arbitrator have the authority to order a make whole award if there was language within the Agreement that was enforceable.

The Agency relied upon the Back Pay Act to preclude the order of back pay should the grievant prevail on the merits of this arbitration. The Back Pay Act of 1966 was amended in 1978 to make it expressly applicable in the disposition of grievances under collective

bargaining agreements to issue back pay awards. [5 USC, Section 5596 (b)] To allow for a back pay award the arbitrator must find that an enforceable provision of a collective bargaining agreement has been violated and that the award of back pay is appropriate. For back pay awards to stand they must strictly comply with the specific provisions of the Back Pay Act or the FLRA may revise or modify the award.

In the case at bar both the Union and the Agency provided case law that supported their contention that the arbitrator did or did not have the authority to render a binding decision in this matter. In light of complexity in the area of what is are is not bargainable, regarding encroachment into management right there are numerous FLRA decision and court decisions that speak to both sides of this issue. The cases regarding this issue are distinguishable and must rely upon fact pattern of each case to determine if a grievance and grievance award will stand or fall based on the management rights as provided for under 5 USC, Section 7106.

The facts of the case at bar do not support an award for the grievant and therefore, whether the arbitrator in this case has the authority to remove Mr. Timiney from the Lead Pharmacy Technician position and place Mr. Merritt into that position with a make whole award, that would include back pay, is a moot point.

THE AWARD:

For the reasons hereto stated, I, Daniel R. Saling, the duly appointed impartial Arbitrator in this matter, do hereby find and decide that the Agency did not violate, misinterpret and/or misapply the language of Article 42 with regard to the issue timeliness. Further the Agency did not violate, misinterpret and/or misapply the language of Article 16 or other relevant statutes or Agency regulation in filling the promotional position of Lead Pharmacy Technician. For these reasons the grievance is denied.

_____ April 24, 2003

Daniel R. Saling, Esq. date